

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	[REDACTED]
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

MOTION AND MEMORANDUM
TO COMPEL PRODUCTION OF DISCOVERY

COMES NOW, the defendant, Zacarias Moussaoui, who respectfully moves this Court for an order compelling discovery by the government pursuant to Federal Rules of Criminal Procedure 16 and *Brady v. Maryland*, 373 U.S. 83 (1963).¹

The government has already provided massive discovery in this case. It began as a trickle, has become a flood, and production is not yet complete. Most of it has not yet been reviewed despite diligent efforts to keep our review efforts up to speed with the government's current pace of production. Accordingly, we assume for now that the government is complying with its Rule 16 and *Brady* obligations except to the extent we focus in this motion on subject matters where, based on exchange of correspondence with the government, we believe the government does not intend to produce discoverable information falling within the subject areas described below. We reserve the right to raise additional issues in the future if they arise.

¹ Redactions are for the purpose of protecting information which would disclose the theory of the defense case. An unredacted copy has been presented *ex parte, in camera* to the Court.

I. REQUESTS

To the extent they are within the custody, control or possession of the government,² or may, by the exercise of the government's due diligence as contemplated by Rule 16 and *Brady*, come within the government's custody, control or possession, Mr. Moussaoui respectfully moves this Court to compel production of documents³ containing information falling within the scope of the following descriptions:

1. Documents containing information related to Middle Eastern men receiving pilot training in the United States from 1994 to the present including, but not limited to, any documents reflecting that any of these men were associated with any terrorist organization; if any were held as material witnesses in connection with September 11, a copy of the material witness warrant and supporting affidavits; and the FBI's so-called Phoenix memo and the FBI report dated May 18, 1998 from Oklahoma discussed in the May 30, 2002 edition of *The Washington Post*.

2. Documents containing post-1994 information relating or referring to any terrorist plans or actions by fundamentalist Muslims, whether or not actually undertaken, that involved or contemplated the use of airplanes in terrorist acts outside the United States and documents containing information concerning the participants in a 1993 Algerian hijacking of a French airliner.

3. Documents reflecting or relating to surveillance of Mr. Moussaoui by agents of a foreign power while he was in the United States.

² For purposes of this motion, "the government" is deemed to include: Any branch of the U.S. military, including any Special Forces; any U.S. law enforcement, investigative or intelligence agency; any branch, office or section of the U.S. Department of Justice, including the U.S. Attorney's Office.

³ "Documents" means information that is recorded on paper or stored in electronic format; it also includes photographs, videotapes, and sound recordings.

4.
 - (a) Documents containing information reflecting the organization of the training camps alleged in the Indictment.
 - (b) Documents containing information about the Khalden Camp, and particularly any documents suggesting that the Khalden Camp was controlled by persons other than Osama Bin Laden.
 - (c) Documents containing information concerning training camps attended by the 19 hijackers and whether they were kept separate and apart from other trainees while at these camps.
 - (d) Documents indicating the selection process by which President Clinton determined which camps in Afghanistan to attack with cruise missiles and whether the Khalden Camp was excluded from such attack.
5. Unredacted FBI 302, dated September 12, 2001, or other identifying information, including full name, address and phone number, of the person identified as “Woods” and similar information for other potential witnesses upon request by the defense.
6. Documents in the possession of the U.S. Government related to or containing information concerning Khalid Shiekh Mohammed, Ramzi Youseff, Ramzi Binh Al Shibh, Ahad Sabet, Yazid Sufaat, and Abu Zabaydah, including recent interviews of Zabaydah and his current whereabouts.
7. Reports of interview and photo spreads or photos related to any interview by government agents where the interviewee was asked to identify Mr. Moussaoui from a photograph and either positively identified Zacarias Moussaoui or, having been presented with a photo or photo spread, was either unable to identify Zacarias Moussaoui or positively state that he did not see Zacarias Moussaoui.

8. Documents containing information about persons other than Zacarias Moussaoui whom the government contends are members of the conspiracy alleged in the Indictment and that reflects meetings, communications, or activities participated in by these persons that do not involve Zacarias Moussaoui, including electronic intercepts of conversations among alleged co-conspirators.

9. Documents reflecting the identities and tier or unit to which assigned or confined of persons who were either inmates or employees on duty at the Sherbourne County Jail on September 11 and any other information in the possession of the government that would assist the defense in locating such persons.

10. Documents containing information that could impeach the credibility of out-of-court declarants whose out-of-court statements are to be introduced against Mr. Moussaoui pursuant to Federal Rules of Evidence 801(d)(2)(C), (D) or (E) or Rules 803 or 804.

11. Documents containing information that suggests or supports the notion of Iraqi State involvement in the planning, funding, training, or conduct of the September 11 attacks, including any meetings between Mohammed Atta and any person suspected of being an Iraqi intelligence official, if not already provided.

12. Documents containing information related to persons who were held or are being held in connection with the events of September 11, including material witness warrants and supporting affidavits.

13. All documents containing information concerning what the government knew prior to September 11 about the possibility of September 11-like attacks and/or the hijackers involved in it, *e.g.*, documents containing information of interest to legislative committees investigating September 11 intelligence failures including but not limited to the Phoenix memo, handwritten margin notes on a copy of the report of the investigation of Zacarias Moussaoui, and the so-called Rowley memorandum.

14. All documents containing information suggesting or stating that most of the nineteen (19) September 11 hijackers did not have full knowledge of the September 11 plot and/or that they were going to die in its execution.

15. Reports prepared by government agencies, including but not limited to the CIA's report and/or charts presented to Congress, that analyze or critique the pre-September 11 performance of intelligence agencies including what was known pre-September 11 that might have led to prevention of the attacks.

16. Rough notes of August, 2001 interviews of Zacarias Moussaoui.

II. THE REQUESTED INFORMATION IS NEEDED FOR THE PREPARATION OF THE DEFENSE

The government, in refusing many of the above requests, did so because they did not see the materiality of the information to defense preparation. We try to set that forth here.

Request No. 1: Documents containing information related to Middle Eastern men receiving pilot training in the United States from 1994 to the present including, but not limited to, any documents reflecting that any of these men were associated with any terrorist organization; if any were held as material witnesses in connection with September 11, a copy of the material witness warrant and supporting affidavits; and the FBI's so-called Phoenix memo and an FBI report dated May 18, 1998 from Oklahoma discussed in the May 30, 2002 edition of *The Washington Post*.

The government will try to argue that Mr. Moussaoui's flying lessons, when combined with his extremist political/religious views, is strong evidence that he was a September 11 participant.

[REDACTED]

See United States

v. Stifel, 594 F. Supp. 1525, 1541-42 (N.D. Ohio 1984); *Kyles v. Whitley*, 115 S. Ct. 1555, 1571-72 (1995).

Request No. 2: Documents containing post-1994 information relating or referring to any terrorist plans or actions by fundamentalist Muslims, whether or not actually undertaken, that involved or contemplated the use of airplanes in terrorist acts outside the United States and documents containing information concerning the participants in a 1993 Algerian hijacking of a French airliner.

The government will try to argue that Mr. Moussaoui is a terrorist and that his flight training could have been for no other purpose than utilizing an airplane to participate in the most infamous terrorist attack in the history of the world. [REDACTED]

Request No. 3: Documents reflecting or relating to surveillance of Mr. Moussaoui by agents of a foreign power while he was in the United States.

Defense has reason to believe that Mr. Moussaoui was being surveilled by agents of a foreign power while he was in the United States. We believe evidence of this surveillance would be highly

exculpatory in that it would show that while he was being surveilled, Mr. Moussaoui did not make any contact with any of the nineteen (19) hijackers or any other person involved in September 11.

- Request No. 4:
- (a) Documents containing information reflecting the organization of the training camps alleged in the Indictment.
 - (b) Documents containing information about the Khalden Camp, and particularly any documents suggesting that the Khalden Camp was controlled by persons other than Osama Bin Laden.
 - (c) Documents containing information concerning training camps attended by the 19 hijackers and whether they were kept separate and apart from other trainees while at these camps.
 - (d) Documents indicating the selection process by which President Clinton determined which camps in Afghanistan to attack with cruise missiles and whether the Khalden Camp was excluded from such attack.

We believe the government will try to prove a link between Mr. Moussaoui and Al Qaeda by trying to prove his participation in activities at a training camp in Afghanistan as alleged in the Indictment.

[REDACTED]

Request No. 5: Unredacted FBI 302, dated September 12, 2001, or other identifying information, including full name, address and phone number, of the person identified as “Woods” and similar information for other potential witnesses upon request by the defense.

FBI 302's (thousands of them) provided to the defense are redacted to eliminate first names of witnesses as well as information that would help locate them. This is done, the government says, to protect witness privacy. Given the massive disclosure of FBI 302's in this case, which the defense appreciates even though they are redacted because it is the only way the defense could possibly prepare this case for trial on the schedule set, the government's approach initially has some persuasiveness. However, when review of a 302 piques defense interest and suggests that counsel might want to interview the witness, the government takes the position that instead of providing counsel the data to do so, government counsel will contact the witness and inquire as to whether the witness wants to be interviewed by the defense. We believe that we should be allowed to make our own approach to the witnesses, and that when, after a review of a 302, we see the need to talk to a particular witness the government should provide us the balance of the personal information with regard to that witness so that we can initiate our own contact. We also may want to issue a trial subpoena for the witness, and we cannot do this without the requested information.

Request No. 6: Documents in the possession of the U.S. Government related to or containing information concerning Khalid Shiekh Mohammed, Ramzi Youseff, Ramzi Bin Al Shihb, Ahad Sabet, Yazid Sufaat, and Abu Zabaydah, including recent interviews of Zabaydah and his current whereabouts.

These individuals are reportedly significant participants or leaders of the conspiracy that is alleged in the Indictment. We would like to:

1. Interview Ramzi Youseff and Abu Zabaydah who are, on information and belief, in U.S. custody. The requested documents would help justify and gain access. Access to government-controlled witnesses is a matter of right. *United States v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996). [REDACTED]

2. From documents we would like to show:

- (a) [REDACTED]

See Sifel and Kyles.

- (b) [REDACTED]

- (c) [REDACTED]

(d) [REDACTED]

Request No. 7: Reports of interview and photo spreads or photos related to any interview by government agents where the interviewee was asked to identify Mr. Moussaoui from a photograph and either positively identified Zacarias Moussaoui or, having been presented with a photo or photo spread, was either unable to identify Zacarias Moussaoui or positively state that he did not see Zacarias Moussaoui.

Obviously, negative identifications can be exculpatory – and positive ones might be incriminating, particularly if not challenged. To the extent eyewitness identifications have been endeavored with either positive or negative results, we believe the defense has the right to the product of those endeavors. Inculpatory evidence, as well as exculpatory evidence, is discoverable under Rule 16 so long as it is

material to the preparation of the defense. *See United States v. Marshall*, 132 F.3d 63, 67-68 (D.C. Cir. 1988).

Request No. 8: Documents containing information about persons other than Zacarias Moussaoui whom the government contends are members of the conspiracy alleged in the Indictment and that reflects meetings, communications, or activities participated in by these persons that do not involve Zacarias Moussaoui, including electronic intercepts of conversations among alleged co-conspirators.

Nineteen of the September 11 conspirators are dead, according to the government.

[REDACTED]

We,

of course, would accept an appropriate stipulation from the government to the effect that Mr. Moussaoui had no contacts with the September 11 conspirators of which the government is aware in lieu of the documents.

Request No. 9: Documents reflecting the identities and tier or unit to which assigned or confined of persons who were either inmates or employees on duty at the Sherbourne County Jail on September 11 and any other information in the possession of the government that would assist the defense in locating such persons.

The government may seek to introduce evidence of an alleged reaction by Mr. Moussaoui when news of the September 11 attacks hit the “Day Room” at the Sherbourne County Jail in Minnesota where he was being held. [REDACTED]

To the extent the government has the information, we request that it be provided because it may lead to the discovery of exculpatory information.

Request No. 10: Documents containing information that could impeach the credibility of out-of-court declarants whose out-of-court statements are to be introduced against Mr. Moussaoui pursuant to Federal Rules of Evidence 801(d)(2)(C), (D) or (E) or Rules 803 or 804.

Rule 806, Federal Rules of Evidence, *Brady*, *Giglio v. United States*, 465 U.S. 150 (1972), and *Kyles v. Whitley*, 514 U.S. 419 (1985), all support the request for this information.

Request No. 11: Documents containing information that suggests or supports the notion of Iraqi State involvement in the planning, funding, training, or conduct of the September 11 attacks, including any meetings between Mohammed Atta and any person suspected of being an Iraqi intelligence official, if not already provided.

[REDACTED]

Request No. 12: Documents containing information related to persons who were held or are being held in connection with the events of September 11, including material witness warrants and supporting affidavits.

The government is believed to be holding or has held, hundreds of people in custody pursuant to 18 U.S.C. § 3144 as material witnesses to matters alleged in the Indictment. Section 3144 provides in pertinent part:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person. . . . Release of a material witness may be delayed for a reasonable period of time until the

deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Each of the “material witnesses” are being held or were held, if the statute has been properly followed, only because the United States filed an affidavit swearing that the testimony of that person is material in a criminal proceeding, and it is shown that it may become impracticable to secure the presence of the person by subpoena. In this case, it is asserted that they have material information about the conspiracy alleged in the Indictment. The defense has been given no information as to the location of these witnesses or what it is that they purportedly know about September 11. Nothing in the statute suggests that it was intended to provide a secret storehouse of witnesses with material testimony about a matter for the government’s exclusive benefit whom the government can hide away from public view. The denial of access to these material witnesses effectively denies the defendant an opportunity to investigate his case and formulate a defense. *United States v. Castillo*, 615 F.2d 878 (9th Cir. 1990) (interference with defendant’s access to potential witnesses deprives defendant of right to plan and present defense). That many of these witnesses may have been released from custody only makes matters worse. The Attorney General has already determined that it is not practicable to secure the presence of these witnesses by subpoena, meaning that it is unlikely that the defense will be able to find these people with reasonable diligence if and when released, or in most cases, deported. It is requested that the Court direct the government to provide the information requested by the defense about these witnesses now so that the defense can then seek access to these witnesses for interview and possible deposition if still detained, and to provide whatever information the government may have as to those witnesses who have been released. Denial of this information is prejudicial to fundamental due process rights, including the right to have counsel

conduct a meaningful investigation, to preserve evidence for use at trial, and to call witnesses. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982). It would be unreasonable and impractical for the Court to require Mr. Moussaoui to explain in detail the materiality of the evidence that he seeks herein. Indeed, the materiality of the requested evidence can be presumed by the circumstances. *Valenzuela-Bernal*, 458 U.S. at 872, citing *United States v. Burr*, 25 Cas. 187 (No. 14, 694) (CC Va. 1807). And, to the extent these witnesses remain in government custody, the government is obligated to provide access to them. *United States v. Tipton*, 90 F.3d 861, 888 (4th Cir. 1996).

Request No. 13: All documents containing information concerning what the government knew prior to September 11 about the possibility of September 11-like attacks and/or the hijackers involved in it, *e.g.*, documents containing information of interest to legislative committees investigating September 11 intelligence failures including but not limited to the Phoenix memo, handwritten margin notes on a copy of the report of the investigation of Zacarias Moussaoui, and the so-called Rowley memorandum.

Request No. 14: All documents containing information suggesting or stating that most of the nineteen (19) September 11 hijackers did not have full knowledge of the September 11 plot and/or that they were going to die in its execution.

Request No. 15: Reports prepared by government agencies, including but not limited to the CIA's report and/or charts presented to Congress, that analyze or critique the pre-September 11 performance of intelligence agencies including what was known pre-September 11 that might have led to prevention of the attacks.

The government has said it intends to seek the death penalty based on an act, false statements during an FBI interview by Mr. Moussaoui on August 16 and August 17, 2001, that caused death. (*See Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death at 22.*) The theory is that had Mr. Moussaoui told the truth during that interview,

September 11 would not have happened. This presupposes that Mr. Moussaoui knew more than what the government already knew and that it would have acted on what he said. The defense is entitled to argue that Mr. Moussaoui knew nothing more, and perhaps less, than what the government already knew and that, in any event, the government was not disposed to act (press reports indicate the FBI had other priorities despite significant information that, if expeditiously investigated, could have prevented the attacks). Accordingly, what the government already knew about the September 11 potential threat at the time it interviewed Mr. Moussaoui and what it subsequently learned prior to September 11 is an important baseline against which the jury must measure whether whatever information it might find was allegedly withheld by Mr. Moussaoui and what effect it would have had on the course of events if it had been disclosed. If the Court excludes this theory (withholding information during FBI interview caused death) as a basis for imposing the death penalty, we do not need the documents in Request No. 13.

[REDACTED]

Request No. 16: Rough notes of August, 2001 interviews of Zacarias Moussaoui.

As described above, the government may well try to base its death case on the notion that alleged false statements made by Mr. Moussaoui during an FBI interview caused death. Because what was actually asked and answered during that interview could literally be a life-or-death issue, the rough notes of the interview are needed by the defense. This request is supported both by Rule 16 and by *Brady v. Maryland* and its progeny.

Prior to 1991, Rule 16(a)(1)(A) required only that the government turn over “the substance of any oral statement which the government intends to offer in evidence at the trial.” Rule 16(a)(1)(A) was

amended in 1991, however, to broaden the government’s disclosure obligations. Rule 16(a)(1)(A) now requires the government to disclose “that portion of *any* written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.” (Emphasis added). According to the drafters, the revised language extends the reach of the rule by “requir[ing] the prosecution . . . to disclose *any written record which contains reference to a relevant oral statement* by the defendant which was in response to interrogation,” regardless of the government’s intent to use the statement at trial. Rule 16, Advisory Committee Notes to 1991 amendments (emphasis added).

Rule 16’s language could scarcely be more plain: any “written record” means *any* record that is written. This reading accords with the common statutory interpretation of the word “any.” “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997) (stating that “any” is term of “great breadth”); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) (stating that “[h]ere, as in *Gonzales*, ‘Congress did not add any language limiting the breadth of that word,’ so ‘any’ means all.”); *see also Salinas v. United States*, 522 U.S. 52, 57 (1997) (noting that use of “[t]he word ‘any,’ which prefaces the . . . clause, undercuts the attempt to impose this narrowing construction”); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) (noting that the repeated use of “any” in statutory and regulatory prohibitions makes clear that prohibitions are meant to be inclusive).

As a written record containing Mr. Moussaoui’s alleged oral statements, notes taken by participants in and observers of the interrogations clearly fall within Rule 16’s inclusive definition. Nothing in Rule 16’s

language suggests that the government need only produce the agent's polished, final summary. Nor does the rule foreclose production of notes when reports derived from those notes have already been produced.

Courts that have considered this issue explicitly in light of the 1991 amendments to Rule 16 have reached the same conclusions. *See, e.g., United States v. Molina-Guevara*, 96 F.3d 698, 705 (3rd Cir. 1996) (holding that Rule 16 requires disclosure of handwritten notes from which agent prepared final report); *United States v. Griggs*, 111 F. Supp. 2d 551, 555 (M.D. Pa. 2000) (finding that "ordering disclosure of the notes is necessary to effectuate the purpose of Rule 16(a)(1)(A)"); *United States v. Carucci*, 183 F.R.D. 614, 615 (S.D.N.Y. 1999) (holding that "unambiguous and unequivocal language" of Rule 16(a)(1)(A) compelled court to require government to disclose agent's notes of defendant's prior interview).⁴

In addition to being discoverable under Rule 16(a)(1)(A), notes containing a defendant's statements are also discoverable pursuant to *Brady v. Maryland*, which requires pretrial disclosure of "evidence favorable to the defendant that is material either to guilt or to punishment," *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547, 553 n.1 (4th Cir. 1999); *see also United States v. Bagley*, 473 U.S. 667, 676 (1985); *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (stating that "duty encompasses impeachment evidence as well as exculpatory evidence").

The Fourth Circuit, in *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978), while noting that "[t]he circuits [were] split on whether an agent's rough notes constitute *Brady* material where their only

⁴ In *United States v. Crowell*, 586 F.2d 1020, 1029 (4th Cir. 1978), decided prior to the 1991 amendments, the Fourth Circuit held that the government had not violated Rule 16 by failing to produce an agent's notes where the agent had testified at trial that "his report incorporated the entire contents of his notes except for those portions which did not relate to the investigation." Under those circumstances, the Court concluded that the government had "furnished counsel all relevant statements in the possession of the government" and that the district court had not erred in refusing to strike the agent's testimony. *Id.* To defense counsel's knowledge, no Fourth Circuit case has addressed this issue squarely since the 1991 amendments took effect.

exculpatory value lies in their use to impeach the agent's testimony," held that an agent's rough notes, later incorporated into a formal report, need not be produced under *Brady* "in the absence of some demonstration that the material sought would be exculpatory." *Id.* at 1029. In that case, in which the original notes had been destroyed, there was only "unsupported speculation that there *may* have been some variance between the notes and the report into which they were incorporated." *Id.*

Crowell was decided, however, before the Supreme Court's decision in *United States v. Bagley*, 473 U.S. 667, 676 (1985), resolved the circuit split and held that impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. As the Fourth Circuit has subsequently noted "[e]vidence that can be used to impeach a witness is unquestionably subject to disclosure under *Brady*." *Spicer*, 194 F.3d at 556. In this case, the accuracy of the interview report, unlike the report in *Crowell*, could determine whether the death penalty is imposed in this case. Accordingly, the Court should exercise its broad discretion to order immediate production of all notes made in connection with any interviews of Mr. Moussaoui, including any written post-interview analysis or notes reflecting the agent's understandings or impressions from the interview.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion and Memorandum to Compel Production of Discovery was served via hand delivery upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 13th of June, 2002.

_____/S/
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